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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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AARON P. SHAINIS
202-857-2942

LEE J. PELTZMAN
202-857-2943

May 4, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

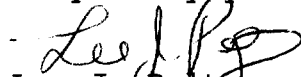
Re: MM No. 93-41
Triad Family Network, Inc.

Dear Ms. Searcy:

Transmitted herewith on behalf of Triad Family Network, Inc., are an original and six (6) copies of its Reply to Opposition to First Petition to Enlarge Issues Against Positive Alternative Radio, Inc.

Should any questions arise concerning this matter, kindly communicate with the undersigned.

Very truly yours,


Lee J. Peltzman
Counsel for

TRIAD FAMILY NETWORK, INC.

Enclosures

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MAY 24 1993

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

TRIAD FAMILY NETWORK, INC.
Winston-Salem, North Carolina
Channel 207C3

POSITIVE ALTERNATIVE RADIO. INC.

) MM No. 93-41

) BPED-910227MD

) BPED-911119MC

In view of Radio's failure to address Triad's allegations squarely, appropriate issues must be designated.

Financial Qualifications

Triad demonstrated in its Petition to Enlarge Issues that Radio's ownership of nine (9) unbuilt construction permits and its filing of four (4) additional applications raised substantial and material questions as to whether Radio's financial qualifications were sufficient to simultaneously construct and operate all 13 proposed stations. It is well established that, where an applicant proposes to construct and operate multiple facilities, it must be able to demonstrate that it is financially qualified as to all of its proposals. Triad cited a number of hearing cases where Commission Presiding Judges added financial issues against applicants which had filed several proposals for new broadcast stations.

In its Opposition, Radio claims that it is ready, willing, and able to demonstrate that it has adequate funds to complete construction of its proposed stations. However, although offered the opportunity in its Opposition to do so, Radio does not attempt to make that demonstration. Moreover, Radio has misread the state of the law with respect to financial qualifications.

Radio declares that its principals, Vernon H. Baker and Virginia L. Baker, at one point, received a line of credit from The Patrick Henry National Bank in the amount of One Million Dollars (\$1,000,000.00). However, Radio provides no documentation to demonstrate this line of credit or its overall qualifications. Nor

does Radio provide financial statements from Vernon Baker or Virginia Baker to demonstrate that, even if the One Million Dollar line of credit existed, money from it has not gone to pay their existing liabilities unrelated to Radio's non-commercial educational interests and broadcast applications.^{1/}

Radio's "trust-me, I'm qualified" claim is similar to the defenses offered, unsuccessfully, in those comparative hearing cases previously cited by Triad. Thus, in Modesto Broadcast Group, FCC 90M-1347, released May 25, 1990, para. 6, Chief Judge Stirmer concluded that "where an applicant files multiple applications, it must be able to demonstrate [by documentation] that it is financially qualified as to all pending applicants. George Edward Gunter, 60 RR 2d 1662, 1664 (1986)." In Warner Robins Christian Academy, FCC 87M-3189, released December 4, 1987, para. 3, the Presiding Judge rejected the defense offered by a non-commercial educational applicant that "it [like Radio] presently is a licensee and, based on its experience as an FCC licensee, it is cognizant of FCC requirements and reaffirms its financial qualifications to

^{1/} In this respect, it should be noted that, according to an April 5, 1993, Petition for Leave to Amend filed by Radio, principals Vernon H. and Virginia L. Baker maintain interests in a number of commercial broadcast stations, including at least five unbuilt construction permits: WCBX(AM), Fieldale, Virginia; WBGS(AM), Point Pleasant, West Virginia; WCQR(AM), Fairlawn, Virginia; WTGR(FM), Union City, Ohio; and WBYG(FM), Point Pleasant, West Virginia. Radio does not claim in its Opposition that Vernon H. and Virginia L. Baker's line of credit is limited to the construction of non-commercial educational FM stations. See Radio Opposition to First Petition to Enlarge Issues, pp. 9-10. Thus, it is likely that the line of credit may be used to construct these commercial permits as well.

build all stations for which it has applied." As in the present case, the applicant in Warner Robins supplied no data to support its claim. In Leonard James Giacone, FCC 87M-512, released March 9, 1987, para. 4, financial and certification issues were added where the applicant claimed to have reviewed financial statements but had "not provided any documentation which would moot the need for further inquiry [at hearing]." See Attachments A, B, and C.

Likewise, here, Radio has not provided any documentation which would moot the need for further inquiry at hearing. Its unsupported claim to financial resources fails to demonstrate that ~~it is financially qualified as to all of its pending permits and~~

included in a financial showing.^{2/} Radio is incorrect in its legal theory, since the case law is clear that such operating costs are part of the financial showing for non-commercial applicants. See e.g. Real Life Educational Foundation of Baton Rouge, Inc., FCC 93-181, released April 16, 1993, para. 10 ("JSM responded that the total estimated costs for constructing the proposed station and operating for three months without revenues are \$200,000.00. . ."); City of New York Municipal Broadcasting System, 59 FCC 2d 737, 743 (Rev. Bd. 1976); Los Angeles Unified School District, 30 FCC 2d 547, 550 (Rev. Bd. 1971); SRC, Inc., 21 FCC 2d 901, 903 (Rev. Bd. 1970).

While the showing required to establish financial qualifications for an applicant for a non-commercial broadcast facility is not as stringent as for a commercial operation, this policy does not excuse a non-commercial applicant from the burden of showing sufficient available funds to meet its estimates for construction and operating expenses. See Quinnipiac College, 33 FCC 2d 1041, 1043 (Rev. Bd. 1972). Here, Radio has not shown the existence of the line of credit which it claims, has now shown the extent of liabilities of its principals and has failed even to factor in proposed operating costs for its nine (9) construction permits and four (4) applications. In view of these failings,

^{2/} See Radio Petition to Enlarge Issues, filed April 8, 1993, p. 2 ("In the case of commercial facilities, applicant must also demonstrate the availability to maintain the operation of its station for three months without revenues. Such an operation-funding requirement has not been enforced against non-commercial applicants.")

appropriate financial qualifications and certification issues should be designated against Radio.

Abuse of Process -- Warehousing Issue

In its Petition to Enlarge Issues, Triad showed that Radio had acquired authorizations for ten (10) non-commercial educational FM stations, but had constructed only one (1) station, WPAR(FM), Hickory, North Carolina. A total of nine (9) stations, some with construction permits initially issued as far back as six (6) years ago, have never been constructed and operated by Radio. Moreover, Radio and its principals have filed additional applications for four (4) non-commercial educational FM stations, including the present application for Asheboro, North Carolina.

Radio denies Triad's allegations, instead claiming that Triad has not demonstrated that Radio has engaged in applying for frequencies that it has no current use for or to prevent use by a competitor. However, a review of those authorizations held and applications filed for by Radio and its principals shows directly to the contrary.

For example, according to the April 5, 1993, Petition for Leave to Amend filed by Radio, principals Vernon H. Baker, Virginia L. Baker, and Edward A. Baker hold a 75% interest in Big River Radio, Inc., holder of two (2) construction permits for AM Station WBYG and FM Station WBGS, Pt. Pleasant, West Virginia. Despite the fact that the Bakers already hold construction permits for two unbuilt Pt. Pleasant stations, this did not stop them, through Radio, from applying for yet another Pt. Pleasant, West Virginia,

facility, this one a non-commercial educational FM station. Similarly, Vernon H. Baker d/b/a Stateline Radio, holds a construction permit for Station WTGR(FM), Union City, Ohio, and Edward A. Baker d/b/a Union City Radio, holds a construction permit for AM Station WBNN, Union City, Indiana. Despite the fact that Edward and Vernon Baker own construction permits for two unbuilt stations at Union City, this did not stop the Bakers, through Radio, from applying for yet another Union City broadcast facility, this one a non-commercial educational FM station.

Finally, Vernon H. Baker, Virginia L. Baker, and Edward A. Baker together hold a 100% interest in Winston-Salem, Greensboro, High Point Area Radio, Inc., licensee of AM Station WSGH, Lewisville, North Carolina, a station which is already on the air. Radio, with the same principals, is also already the permittee of unbuilt, non-commercial educational FM Station WXRI, Winston-Salem, North Carolina, which proposes to operate from the same transmitter site as WSGH. Triad filed its Winston-Salem, North Carolina, application on February 27, 1991. That application offers a potentially competitive service to WXRI. Radio has an application filed for Asheboro, North Carolina, on top of Triad's Winston-Salem application, thereby depriving Triad from receiving a potentially competitive grant.

The ramifications of the above facts can hardly be avoided. They show repeated circumstances in which Radio has applied for frequencies that it has no current use for and/or which has prevented a potential competitor to another Radio authorization

from receiving an immediate grant of its application.

Radio also claims that its authorized stations are under construction and in several cases are ready to commence operation. Yet, after six years of receiving extensions, the fact remains that only one non-commercial educational FM station owned by Radio has been constructed and is presently operating. The Commission cannot make the mistake of again entrusting Radio with yet another authorization when there is another qualified applicant (Triad) which is ready and able to not only receive an authorization but to complete construction and commence immediate operation.^{3/}

ACCORDINGLY, in view of the above, Triad again respectfully requests that its Petition to Enlarge Issues be granted and the issues sought against Radio be added.

Respectfully submitted,

TRIAD FAMILY NETWORK, INC.

By: Aaron P. Shainis (JP)
Aaron P. Shainis

By: Lee J. Peltzman
Lee J. Peltzman
Its Attorneys

SHAINIS & PELTZMAN
1255 23rd Street, N. W. #500
Washington, D. C. 20037
202/857-2946
May 4, 1993

^{3/} Radio argues that Triad is asking the Presiding Judge to overrule the staff with respect to the grant of extension requests to complete construction. Triad is seeking no such action by the Presiding Judge. Rather, Triad is asking the Commission to recognize that an applicant which has had nine opportunities to construct and can point to no successes within the last six years should not again be awarded with another authorization.

ATTACHMENT A

Modesto

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 90M-1347

04181

In re Applications of)	MM DOCKET NO. 90-68
MODESTO BROADCAST GROUP)	File No. BPH-880229MB
HARRY S. McMURRAY)	File No. BPH-880301MP
MODESTO COMMUNICATIONS CORPORATION)	File No. BPH-880301NC
JUAN MANUEL AYALA)	File No. BPH-880301NF
EILEEN S. LAPIN, DOUGLAS M. LAPIN and)	
STANLEY P. LAPIN d/b/a LAPINCO)	File No. BPH-880301NJ
JUAREZ and FLORES, INC.)	File No. BPH-880301OJ
BCD LIMITED PARTNERSHIP)	File No. BPH-880301OS
FROM DEINSTEIN COMMUNICATIONS)	

To determine whether Pamela R. Jones has violated Section 1.65 of the Commission's rules in connection with her failure to timely amend her application to update the status of her media interests;

To determine whether Pamela R. Jones had a reasonable basis at the time she filed her Modesto application on which to certify that she was financially qualified, and, if not, whether her financial certification was false; and

To determine, in light of the evidence addressed in the foregoing issues, whether Pamela R. Jones possesses the basic qualifications to be a Commission licensee.

3. In support of its request, Reinstein alleges the following facts: That Jones filed her Modesto application on March 1, 1988, reporting therein that she was an applicant for Nags Head, North Carolina (BPH-861014TA); that on March 23, 1988, Jones amended her application reporting the filing of an application for Carlsbad, New Mexico (File No. BPH-880323MK) in which she had a 49 percent interest; in a June 6, 1988, amendment, Jones reported that she filed six additional applications for new FM stations as follows: Fort Wayne, Indiana (File No. BPH-880421MR), Olathe, Kansas (File No. BPH-880421NK), Macon, Georgia (File No. BPH-880421NL), Virginia Beach, Virginia (File No. BPH-880505NR), Roanoke, Virginia (File No. BPH-880602OL), and Bixby, Oklahoma (File No. BPH-880602OK). In an amendment to her Modesto application filed March 14, 1989, Jones reported that she had filed five more FM applications as follows¹: Ellettsville, Indiana (File No. BPH-880725ML), Brownsburg, Indiana (File No. BPH-880725MF), Homewood, Alabama (File No. BPH-880811MJ), Lexington, Kentucky (File No. BPH-880811MG), and Bethalto, Illinois (File No. BPH-880811MP). She additionally reported that her application for Nags Head, North Carolina, had been voluntarily dismissed.² Reinstein argues that because Jones, since August 11, 1988, had 13 pending applications on file for 13 new FM stations, her filings violated the Commission's multiple ownership rules, conflicting applications rule, and constituted an abuse of the Commission's

1 The March 14, 1989, amendment reported events that occurred in July and August 1988. As such, it was untimely filed pursuant to the requirements of Section 1.65.

2 Jones did not pay the hearing fee or file a notice of appearance.

processes. Specifically, it is alleged that Jones has "played fast and loose with the Commission's Rules," and this calls into question her basic qualifications.

4. With respect to the request for a Section 1.65 issue, Reinstein alleges that Jones did not timely amend to report her other applications, and that she previously had reporting issues specified against her in connection with prior applications for Baroque, Virginia (BDCT-220415X).

numerous broadcast applications. It is also clear that a reporting issue was previously designated against an applicant with which Jones was associated. It also appears that Jones did not timely respond to a directive in the Hearing Designation Order (DA 90-196 at paragraph 15) requiring an amendment of her application. The Presiding Judge is unable to determine, on the basis of the pleadings, whether the reporting deficiencies committed by Jones are disqualifying. Thus an appropriate issue will be specified.³

8. Finally, the arguments made by Jones regarding the inconsistent application rule and the multiple ownership rule are not persuasive. In this connection, the staff recently returned the Homewood, Alabama, application of Jones as being in violation of Sections 73.3555(a) and 73.3518 of the Commission rules. (See April 27, 1990, letter attached to Reinstein's reply pleading). Thus, while the total number of applications now on file by Jones does not violate the rules, the question of whether such violations occurred with respect to the applications filed by Jones must be explored. Moreover, while Jones argues that her minority interest in the Carlsbad application and her divestment commitment takes her filings outside the rules, this apparently was not the position of the staff when it returned the Homewood, Alabama, application. Furthermore, the claim of minority interest in the Carlsbad application on the part of Jones may require further scrutiny. Specifically, the holder of the other 51 percent is Michael Wilhelm who is Jones lawyer in this and her other pending applications. Also, Mr. Wilhelm has been associated with Jones in other applications filed with the Commission. The filing of these applications and the facts attendant thereto must be explored to determine whether violations of the Commission's rules have been committed, and whether Jones has abused the processes of the Commission.

Accordingly, IT IS ORDERED that the "Petition to Enlarge Issues Against Pamela R. Jones" filed by Thom Reinstein Communications, A California Limited Partnership on April 13, 1990, IS GRANTED to the extent reflected herein, and the following issues are added to this proceeding:

To determine the facts and circumstances regarding the filing of the numerous applications by Pamela R. Jones, and, based thereon, whether she has violated the provisions of Section 73.3555

3 The Hearing Designation Order does not indicate that the reporting failures were ever considered prior to designation. They are, therefore, matters that may be considered by the Presiding Judge. See, Frank H. Yemm, 39 RR 2d 1657 (1977); Atlantic Broadcasting Co., 5 FCC 2d 717, 721 (1966); Fidelity Radio Inc., 1 FCC 2d 661 (1965). Thus, Jones' argument to the contrary is rejected.

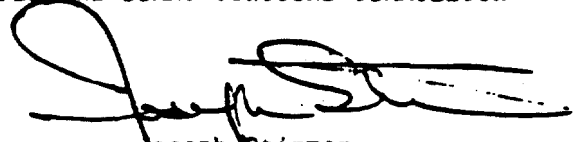
and Section 73.3518, and/or abused the Commission's processes;⁴

To determine whether Pamela R. Jones has violated Section 1.65 of the Commission's rules in connection with her failure to timely amend her application to update the status of her media interests;

To determine whether Pamela R. Jones is financially qualified to build and operate her proposed station, particularly in light of her other pending applications, and whether her financial certification was/is false.

IT IS FURTHER ORDERED that because the facts necessary to resolve these issues are peculiarly within the knowledge of Pamela R. Jones, the burden of proceeding AND the burden of proof WILL REST with Pamela R. Jones.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Stirmer
Chief Administrative Law Judge

⁴ Subsumed within this issue is the question of the purpose of these filings. In this connection, it appears that in addition to the specific applications mentioned herein, Jones (who proposes no integration) has previously been involved in other applications which have been dismissed voluntarily or as a result of settlement agreements.

ATTACHMENT B

RECEIVED

REDDY, BEGLEY & MARTIN

DEC 13 1987

Warner Robins binder

12/4/87

delivered to

and filed by

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

B

FCC 87M-3159

In re Applications of

MM Docket No. 87-386

Bible Baptist Temple, Inc. d/b/a
WARNER ROBINS CHRISTIAN ACADEMY
Warner Robins, Georgia

File No. BPED-850924MI

1043

AUGUSTA RADIO FELLOWSHIP INSTITUTE, INC.
Byron, Georgia

File No. BPED-860422MA

For Construction Permit for a
New FM Station on Channel 213C1

MEMORANDUM OPINION AND ORDER

Issued: December 3, 1987; Released: December 4, 1987

1. Under consideration is a Motion to Enlarge Issues filed October 26, 1987 by Warner Robins Christian Academy ("Warner") and responsive pleadings.

2. Warner seeks a financial issue against Augusta Radio Fellowship Institute, Inc. ("Augusta"). Warner alleges that since it filed its application in this proceeding, Augusta has filed for additional applications for construction permits for new noncommercial educational FM stations. In each case Augusta certified that it is financially qualified to construct and operate. Warner argues that the number of applications filed by Augusta raises a substantial question regarding its financial capability to construct and operate its Byron station. Warner notes that Augusta is a nonprofit corporation which relies on contributions to meet operating costs and debt service.

3. In response Augusta argues that Warner's charge is speculative and distinguishes the cases cited by Warner. It also states that it presently is a licensee and based on its experience as an FCC licensee it is cognizant of FCC requirements and reaffirms its financial qualifications to build all stations for which it has applied. No other data is supplied.

4. Given the number of broadcast applications and the costs of construction and operation associated therewith, plus the fact that Augusta is a non-profit organization that must rely on contributions for funding, a substantial question is raised whether Augusta has sufficient net liquid assets available from committed sources for construction and operations of their proposed station in addition to

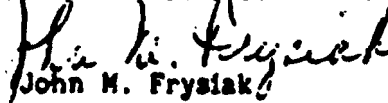
the funds needed for the other broadcast facilities applied for. George Edward Gunter, 104 FCC 2d 1363, 1367 (Rev. Bd. 1986). Augusta has not provided any documentation that it would obviate the need for inquiry. The requested issue will be added.

Accordingly, IT IS ORDERED that the Motion to Enlarge Issues filed October 26, 1987 by Warner Robins Christian Academy IS GRANTED and the following issue IS ADDED:

Whether Augusta is financially qualified to construct and operate its proposed station at Byron, Georgia, in light of its subsequent certifications of the availability of funds to construct and operate new noncommercial educational FM stations at Jessup, Vidalia and Leesburg, Georgia; and Florence, South Carolina.

IT IS FURTHER ORDERED that because the information necessary to resolve these issues is solely within the knowledge of Augusta, the burden of proceeding and burden of proof on the added issue WILL BE on Augusta.

FEDERAL COMMUNICATIONS COMMISSION


John M. Frysiake
Administrative Law Judge

ATTACHMENT C

RECEIVED

REDDY, BEGLEY & MARTIN

MAR 12 1987

Addressed to _____

Handled by _____

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 87M-512
2008

In re Applications of

LEONARD JAMES GIACONE

MINORITY BROADCASTING CORPORATION

GORDON L. BOSTIC, et al., d/b/a
BOSTIC BROADCASTING

RADIO LAUREL, LTD.

FM LAUREL, INC.

For Construction Permit
for a New FM Station
Laurel, Mississippi

) MM Docket No. 86-468

) File No. BPH-860116MI

) File No. BPH-860122MX

) File No. BPH-860123MY

) File No. BPH-860123MZ

) File No. BPH-860123NE

MEMORANDUM OPINION AND ORDER

Issued: March 5, 1987 Released: March 9, 1987

1. Under consideration are "Motion To Enlarge Issues" filed January 22, 1987 by Leonard James Giacone (Giacone), Opposition To Petition To Enlarge Issues filed February 18, 1987 by Radio Laurel, Ltd. (Radio Laurel), and Reply To Opposition To Petition To Enlarge Issues filed February 27, 1987 by Giacone.

2. Giacone seeks the addition of misrepresentation and financial qualification issues against Radio Laurel. The issues will be added.

3. Radio Laurel is a limited partnership consisting of Lula Cooley, General Partner (10%), Wilbur O. Colom, Limited Partner (45%), and James Y. Becker (45%). Colom and Becker own 60 - 90% of six pending FM applications. In addition, Colom owns 33 - 45% of three pending television applications and two unbuilt television construction permits. 1/ Funding for the construction and initial operation of the proposed Laurel station will come from Colom and Becker.

1/ Giacone also notes that Colom held similar interests in three other television applications, which while now dismissed were pending at times relevant with respect to the applications currently in question.

4. As noted by Giacone, given the number of broadcast applications involving Colom and Becker and the costs of construction and operation associated therewith, a substantial question is raised whether Radio Laurel has sufficient net liquid assets available from committed sources for construction and operation of the proposed station in addition to the funds needed for the other broadcast facilities applied for. George Edward Gunter, 104 FCC 2d 1363, 1367 (Rev. Bd. 1986). Radio Laurel has not provided any documentation which would moot the need for further inquiry. In her statement appended to Radio Laurel's opposition, Cooley asserts that she has reviewed the personal financial statements of Colom and Becker. However, as Giacone notes, her statement is conspicuously silent as to whether she has considered or is even aware of the financial requirements attendant to the numerous other applications to which Colom and Becker are a party. Finally, as also noted by Giacone, a substantial question is raised as to whether there existed at the time of certification or as of this date a written commitment by Colom and Becker to provide funds to Radio Laurel. The requested issues are warranted and will be added.

Accordingly, IT IS ORDERED, That the "Motion To Enlarge Issues" filed January 22, 1987 by Leonard J. Giacone IS GRANTED and the following issues ARE ADDED:

To determine whether Radio Laurel, Ltd. has sufficient net liquid assets available to construct and operate its proposed station in view of the other broadcast construction and operation financial commitments of its principals; and

To determine in light of the evidence adduced under the preceding issue, whether Radio Laurel, Ltd. misrepresented facts or lacked candor in certifying its financial abilities to construct and operate the proposed station; and

To determine, in light of the evidence adduced under the preceding issues, whether Radio Laurel, Ltd. possesses the requisite financial and basic qualifications to be a Commission licensee.

IT IS FURTHER ORDERED, That because the information necessary to resolve these issues are peculiarly within the knowledge of Radio Laurel, Ltd., the burden of proceeding and burden of proof on the added issues WILL BE on Radio Laurel, Ltd. 2/ 3/

FEDERAL COMMUNICATIONS COMMISSION



Joseph Chachkin
Administrative Law Judge

2/ Radio Laurel may present oral testimony as well as written evidence under the added issues. If it intends to submit oral testimony, the names of persons to testify orally and a brief summary of their testimony are to be provided, and such statements shall be filed on April 13, 1987, the presently scheduled exchange date.

3/ Any discovery on the added issues shall be commenced within ten (10) days after release of this Order.

CERTIFICATE OF SERVICE

I, Linda E. Skiles, Office Administrator of the law firm of Shainis & Peltzman, do hereby certify that copies of the foregoing document were mailed this 4th day of May, 1993, to the offices of the following:

Administrative Law
Judge Joseph P. Gonzalez *
Federal Communications Commission
Room 221
2000 L Street, N. W.
Washington, D. C. 20554

Norman Goldstein, Esq. *
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
Room 7212
2025 M Street, N. W.
Washington, D. C. 20554